

SERVED: September 2, 1994

NTSB Order No. EA-4246

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of August, 1994

DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-12051
v.)	
)	
KENNETH H. BERNSTEIN,)	
)	
Respondent.)	
)	

ORDER DENYING RECONSIDERATION

Respondent has filed a petition for reconsideration of our opinion and order in EA-4120 (served March 29, 1994), where we affirmed the law judge's initial decision upholding a 120-day suspension of respondent's private pilot certificate based on his operation of an unairworthy aircraft on three separate flights, in violation of 14 C.F.R. 91.29(a) [now recodified as 91.7(a)], 91.33(a) [now recodified as 91.205(a)], and 91.9 [now recodified as 91.13(a)].

Respondent's petition reiterates many of the arguments that he made on appeal, and which were rejected in EA-4120. He asserts that the issues were wrongly decided, and accuses the Board of "ignoring" several aspects of the case. We have again reviewed the entire record and continue to believe, as we indicated in EA-4120, that respondent's operation of his aircraft without an operating tachometer -- in the face of a regulation

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explicitly prohibiting such operation, an aircraft condition notice notifying him that the condition had to be corrected prior to flight, and the advice of a mechanic that his aircraft was unairworthy without an operating tachometer -- was a violation of the cited regulations, and warrants the 120-day suspension therein affirmed.

Contrary to respondent's continued assertions, Mr. Desrosiers (the aircraft mechanic respondent consulted after another mechanic had already told him his aircraft was unairworthy without an operating tachometer) was not an agent of the FAA upon whose opinion of flyability or airworthiness he was entitled to blindly rely. As we recently noted in Administrator v. Bognuda, NTSB Order No. EA-4139 at 3, n. 4 (1994), aircraft airworthiness is a question of fact, and a mechanic's certification may be proven to be in error. Thus, the fact that Mr. Desrosiers may have indicted to respondent that his aircraft was safe to fly with an inoperable tachometer did not estop the FAA from taking enforcement action against respondent for his violations. As we explained in EA-4120, in light of respondent's actual and constructive knowledge that his aircraft was unairworthy, respondent's reliance on Mr. Desrosiers' alleged representation to the contrary was unreasonable. (EA-4120 at 6.)

Similarly, we reject respondent's position, articulated for the first time in his petition for reconsideration, that Mr. Desrosiers' tie-wrapping of the broken tachometer cable to keep it from damaging the newly-repaired aileron control cables constituted the "FAA-approved equivalent" of an operable tachometer under section 91.205.

Nor is respondent's operation of his aircraft with an inoperable tachometer excused by section 91.213(d). Although subsection (d)(4) authorizes operation of an aircraft with inoperative instruments or equipment when (among other things) a "determination" is made by a properly-certificated person that the inoperative equipment does not constitute a hazard to the aircraft (subsection (d)(4)), subsection (d)(2)(iii) makes clear that the entire subsection (d) exception is inapplicable when the inoperative instrument or equipment is required by section 91.205 [formerly 91.33].¹ An operative tachometer for each engine is required by section 91.205 for all types of operations.

Respondent also seeks recognition of the fact that there is apparently only one general aviation mechanic on the island of Martha's Vineyard, and suggests that his handling of the situation in light of that mechanic's perceived uncooperativeness was justifiable. While this factor might well have contributed

¹ We express no opinion as to whether Mr. Desrosiers' comments as to the flyability of the aircraft would otherwise have qualified as a "determination" under section 91.213(d)(4).

to respondent's decision to operate the aircraft with an inoperable tachometer, we cannot agree with respondent's suggestion that he had no option but to do so, and that the lack of additional repair facilities on the island constitutes a defense to his violations.

We reaffirm our rejection of respondent's Fourth Amendment arguments (EA-4120 at 8-9); our rejection of his assertion that "airworthiness" is a term which is void for vagueness (EA-4120 at p. 5, n. 6); our acceptance of the law judge's credibility findings (EA-4120 at p. 6, n. 10); and our discussion of respondent's procedural arguments (EA-4120 at 9-10). Finally, regarding respondent's challenge to the 120-day suspension imposed in this case, we note that he has cited no comparable precedent which dictates a different result. Furthermore, we have no authority to substitute administrative action such as a remedial training program, as respondent urges, for a legal enforcement action (e.g., a certificate action or a civil penalty).²

ACCORDINGLY IT IS ORDERED THAT:

Respondent's petition for reconsideration is denied.

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above order.

² See Administrator v. Brune, NTSB Order No. EA-4108 at 4, n. 7 (1994), and cases cited therein.